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ABSTRACT

The purpose of this paper is to help identify newspaper advertisements which fall under the protection of the First Amendment. Although the Supreme Court declared in 1942 that advertisements which propose a purely commercial transaction were not protected by the First Amendment, in 1976 it decided that commercial expression, like other forms of expression, is not wholly without the right to freedom of speech and press. Newspaper advertisements are, however, still subject to restrictions of time, place, and manner of publication. Certain types of advertisement (such as that by doctors, lawyers, etc.), misleading advertisements, advertisements which propose illegal transactions, and obscene or inherently offensive materials are also prohibited. (Author/KS)

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NEWSPAPER ADVERTISING AND THE FIRST AMENDMENT:

THE COMMERCIAL SPEECH DOCTRINE

by

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I. Introduction

All I know is just what I read in the papers.
Will Rogers

It is no accident that the first item in the Bill of Rights guarantees that newspapers in this country shall operate freely. The importance of that guarantee is emphasized by the language: "Congress shall make no law . . . abridging the freedom of speech, or of the press."[1] This command that no law shall inhibit freedom of the press, however, is not as absolute as the language would seem to indicate. The Supreme Court of the United States has been forced many times to interpret the meaning of that clause, finding that the language affords protection to newspapers from governmental interference,[2] but

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1. U.S. Const. amend. I.

2. First amendment freedoms of speech and press are fundamental rights protected by the fourteenth amendment from impairment by the States. After 1925, states' regulation of expression was subject to review by the U.S. Supreme Court. Gitlow v. New York, 268 U.S. 652, 666 (1925).

does not promise an "absolute" freedom of expression.[3] In the view of the Supreme Court, the clause was included by the Founding Fathers[4] to enable the press to serve the immensely important role in our society of informing the people of the actions of their government,[5] to be a watchdog. The guarantee of a free press has the primary purpose of creating "a fourth

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3. While the first amendment does not contain a specific limiting phrase, the courts have consistently held that the sweeping command against suppression does not promise an "absolute" freedom of expression. See New York Times Co. v. United States, 403 U.S. 713, 761 (1971) (Blackmun, J., dissenting).

4. For the history surrounding the ratification of the speech and press clause, see Richards, The Historical Rationale of the Speech-and-Press Clause of the First Amendment, 21 U. Fla. L. Rev. 203 (1968).

5. See Mills v. Alabama, 384 U.S. 214 (1966):

> there is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs. Id. at 218.

institution outside the Government as an additional check on the three official branches."[6]

There is no question that newspapers play a vital role in the "free press"[7] which carries out this first amendment purpose of acting as an additional check. But only if a newspaper survives can it continue to fulfill this role, and

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New York Times Co. v. United States, 403 U.S. 713 (1971):

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. . . . The press was protected so that it could bare the secrets of government and inform the people. Id. at 717 (Black and Douglas, J.J., concurring).

6. Mr. Justice Potter Stewart in a speech at Yale Law School. See Stewart, "Or Of the Press," 26 Hastings L. J. 631, 634 (1975).

7. This paper is concerned with the printed press, newspapers. But the term "press" includes the "media." See United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

survival for a newspaper means selling advertising.[8] The first amendment depends, at least in part, upon newspapers to achieve its purpose, and newspapers depend upon advertising. So, indirectly, the first amendment depends in part on successful newspaper advertising.

This paper will explore the relationship between advertising, newspapers, and the courts, and then examine in some detail the protection which the first amendment has provided, and now provides, to newspaper advertising.

II. Pay As You Ride

There is a much larger literate population reading newspapers today than a half century ago, while there are fewer newspapers to read.[9] One reason for the decline in the number of newspapers is that the successful operation of a paper has become big business, requiring large amounts of revenue. The primary source

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8. See note 10 infra and accompanying text.

9. Miami Herald Publ. Co. v. Tornillo, 418 U.S. 241, 249 (1974).

of revenue for newspapers is advertising, which generally accounts for 70 percent of a paper's income.[10]

On the other hand, newspaper advertising is also an important factor to the businesses which advertise, often considered a necessity to the successful operation of those businesses.[11] This is manifest by the fact that businesses spent more than 1.12 billion dollars[12] last year on advertisements in daily newspapers, and there is expected to be an increase this year.[13]

While the amount of advertising revenue has a direct relationship to the newspaper's ability to provide adequate

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10. Media and the First Amendment in a Free Society, 60 Geo. L.J. 867, 893 (1972).

11. U.S. v. Harte - Hanks Newspapers, Inc., 170 F. Supp. 227, 228 (N.D. Tex. 1959).

12. Advertising Age, Apr. 21, 1975, at , col. 1.

13. Leo, Kauffman says newspapers are the "in" ad medium, Editor and Publisher, Apr. 5, 1975, at 17. The author believes that a "new set of economic and sociological circumstances are creating a favorable climate for newspaper advertising." Id.

news coverage,[14] a newspaper is under no obligation to sell advertising space to anyone.[15] Generally, a newspaper can be operated at the whim of its owner,[16] free to accept or reject an advertisement, even if the advertisement is a proper one and a fee is tendered for its publication.[17] However, this does not mean that a

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14. Miami Herald Publ. Co. v. Tornillo, 418 U.S. 241, 257 n. 22 (1974). For a discussion of the implications of the media's goal of maximizing profits instead of maximizing discussion, see Barron, Access to the Press -- A New First Amendment Right, 80 Harv. L. Rev. 1641, 1660 (1967).

15. See Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971); Amalgamated Clothing Workers v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), cert. denied, 402 U.S. 973 (1971).

16. Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994, 1003 (1966).

17. Annot., 18 A.L.R. 3d 1286, 1287-88 (1968). The only significant limitation on newspapers is the prohibition of the antitrust laws. See Loraine Journal Co. v. United States, 342 U.S. 143 (1951); Kansas City Star Co. v. United States, 240 F2d 643 (8th Cir. 1957), cert. denied, 354 U.S. 923 (1957).

newspaper is free from regulation, as the Supreme Court has long held that newspapers can be regulated on business and economic matters as with any other business.[18] It does mean that there can be no prior restraint or restriction on what news items a newspaper may publish,[19] nor can there be any command that a newspaper publish what it chooses not to publish.[20] The Supreme

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18. See, e.g., Crosjean v. American Press Co., 297 U.S. 233, 250 (1936) (publisher is subject to ordinary forms of taxation); Associated Press v. United States, 326 U.S. 1 (1945) (antitrust laws); Associated Press v. N.L.R.B., 301 U.S. 103 (1937) (National Labor Relations Act); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (Fair Labor Standards Act).

19. See Near v. Minnesota, 283 U.S. 697 (1931).

20. Branzburg v. Hayes, 408 U.S. 665, 681 (1972); Miami Herald Publ. Co. v. Tornillo, 418 U.S. 241, 261 (1974) (White, J., concurring: "elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor.")

Court has noted that

> [t]he power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers -- and hence advertisers -- to assure financial success; and second, the journalistic integrity of its editors and publishers.[21]

The first and most important aspect of survival is financial success, made possible by advertising. The "journalistic integrity" of newspapermen that is needed if we are to have a responsible press has been described by the Supreme Court as a "desirable goal," but the Court noted that "press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[22]

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21. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973).

22. Miami Herald Publ. Co. v. Tornillo, 418 U.S. 241, 256 (1974).

III. Editorial Judgment -- What "Reason" Dictates

> I tell you I have been in the editorial business going on fourteen years, and it is the first time I ever heard of a man's having to know anything in order to edit a newspaper.
>
> Mark Twain[23]

The judgment of what to publish in a newspaper is reserved to the editors of that newspaper. They are free to publish whatever their "reason"[24] dictates. There can be no limitation on the size and content of a newspaper, nor on the "treatment of public issues and public figures -- whether fair or unfair,"[25] since this is a matter of editorial judgment. The Catch-22 is that the publishers may be held responsible for what is published,

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23. Mark Twain, How I Edited an Agricultural Paper, in Mark Twain's Best 6 (1971).

24. Associated Press v. United States, 326 U.S. 1, 20 n. 18 (1945); see Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

25. Calley v. Callaway, 382 F. Supp. 650, 683 (1974). See also Miami Herald Publ. Co. v. Tornillo, 418 U.S. 241, 258 (1974).

both legally[26] and in the minds of the readers.

While the layout, size and general content of a newspaper are free from regulation, the advertisements that are included in the newspaper are not free from governmental control, but are subject to "reasonable regulation that serves a legitimate public interest."[27] This reasonable regulation cannot be so severe that it financially threatens to put a newspaper out of business,[2]

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26. See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)

27. Bigelow v. Virginia, __U.S.__, 43 U.S.L.W. 4734 (U.S. June 16, 1975). See also Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). Other authority is cited at note 11 in Bigelow, Id.

28. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 383 (1973). The Court stated that Pittsburgh Press had not argued such a threat, the implication being that if such a threat or impairment were shown, it would render unconstitutional an otherwise valid regulation of commercial speech. A similar argument was raised in United States v. Hunter, 459 F.2d 205 (4th Cir.), cert. denied, 409 U.S. 934 (1972). "[A] newspaper can be silenced as easily by cutting off its source of funds, as it can be by enjoining its publication." 459 F.2d at 212.

nor can it unduly interfere with the editorial judgment of the publisher.[29] But if the newspaper publishes a purely commercial advertisement, then that printed advertisement is subject to governmental regulation.

IV. Commercial Speech

Advertisements which do no more than propose a purely commercial transaction have been within what is called the "commercial speech doctrine," and have not been protected by the first amendment.[30] But not all advertisements were "commercial speech." This paper will trace the development of the doctrine, outline the guidelines which until 1976 were used to determine if an advertisement was purely commercial and thus subject to regulation and restriction, or whether the advertisement was not commercial speech and hence protected against regulation, and record the limitation of the doctrine which came with Virginia State Board.

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29. See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

30. There are several general rules which limit the extent to which government may regulate use of the media. See United States v. O'Brien, 391 U.S. 367, 376-77 (1968); Note, Constitutional Law - The First Amendment and Advertising: The Effects of the "Commercial Activity" Doctrine on Media Regulation, 51 N.C.L. Rev. 581, 587 (1973).

The commercial speech doctrine was sometimes misapplied in the lower courts,[31] as in cases which treated the doctrine as applying to credit reports,[32] hooks on mailboxes,[33] and

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31. Carpets by the Carload, Inc. v. Warren, 368 F. Supp. 1075, 1076-78 (E.D. Wis. 1973) (false advertisements are commercial speech and not protected by the first amendment); Jenness v. Forbes, 351 F.Supp. 88, 96-97 (D.R.I. 1972) (commanding officer of air station restricting commercial activities on areas of the base, upheld on the basis of commercial speech not protected); Boscia v. Warren, 359 F.Supp. 900 (D.C. Wis. 1973) (statute forbidding "saloon" on sign held not to violate first amendment on basis of commercial speech). See also United States v. Hunter, 459 F.2d 205, 211 (4th Cir.), cert. denied, 409 U.S. 934 (1972); Barrick Realty, Inc. v. City of Gary, 354 F.Supp. 126, 132 (N.D. Ind. 1973). For a compilation of lower court decisions attempting to apply the commercial speech doctrine, see DeVore and Nelson, Commercial Speech and Paid Access to the Press, 26 Hastings L.J. 745, 749-55 (1975).

32. See Hood v. Dun & Bradstreet, Inc., 486 F.2d 25, 29-30 (5th Cir. 1973), cert. denied, 415 U.S. 985 (1974).

33. See Rockville Reminder, Inc. v. United States Postal Serv., 480 F.2d 4, 7-8 and n. 8 (2d Cir. 1973).

topless dancing.[34] The misapplication also included cases dealing with advertisements in newspapers. As stated before, advertisements were not "commercial speech" simply because they were advertisements. The fact that a newspaper was paid for publishing an advertisement was not determinative,[35] just as the fact that "books, newspapers, and magazines are published and sold for profi does not prevent them from being a form of expression whose libert is safeguarded by the First Amendment."[36]

The pre-1976 starting point in determining whether an ad was within first amendment protection did not concern "commercial speech." The starting point was to determine whether the ad was

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34. See Hodges v. Fitle, 332 F.Supp. 504, 509 (D. Neb. 1971).

35. New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) ("That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." Id.) See Smith v. California, 361 U.S. 147, 150 (1959); Ginzburg v. United States, 383 U.S. 463, 474 (1966).

36. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952). See also Thomas v. Collins, 323 U.S. 516, 531 (1945); Murdock v. Pennsylvania, 319 U.S. 105, 110-11 (1943).

within one of the categories of expression which are excluded from first amendment protection because of their inherent offensiveness.[37] If an advertisement contains obscenity,[38] libelous statements,[39] "fighting words,"[40] or incitements,[41] then the expression was -- and still is -- excluded from first amendment protection because it is within an "inherently offensive" category the "commercial speech" aspect of the advertisement would not have been considered. In addition, false or fraudulent advertising is not protected by the first amendment,[42] nor is most

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37. See Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

38. See Roth v. United States, 354 U.S. 476, 481-85 (1957); Miller v. California, 413 U.S. 15 (1973).

39. See, e.g., Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974).

40. See, e.g., Chaplinski v. New Hampshire, 315 U.S. 568, 572 (1942).

41. See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969).

42. Donaldson v. Read Magazine, 333 U.S. 178, 191 (1948); Public Clearing House v. Coyne, 194 U.S. 497 (1904).

advertising which proposes illegal activity.[43]

If the ad is not excluded for one of the above reasons, then the content before Virginia State Board had to be analyzed to determine if first amendment protection applied. To understand

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43. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

> Discrimination in employment is not only a commercial activity, it is illegal commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of norcotics or soliciting prostitutes. Id. at 388.

See Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949), declaring that

> it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. Id. at 502.

how content was analyzed, we must trace the development of the doctrine of commercial speech.

V. Mr. Chrestensen's Primary Purpose

The proposition that "purely commercial" advertisements do not deserve first amendment protection originated[44] in 1942 in the case of Valentine v. Chrestensen.[45] In that case, Chrestensen was prohibited by New York City's sanitary code from distributing handbills advertising a submarine which he desired to exhibit for

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44. A Supreme Court statement to this effect was made in Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384 (1973) (commercial speech doctrine is traceable to the brief opinion in Valentine).

In early Supreme Court decisions, the regulation of commercial speech was not considered as a first amendment issue. See Fifth Ave. Coach Co. v. New York, 221 U.S. 467 (1911) (ordinance prohibiting advertising upheld against equal protection challenge) Packer Corp. v. Utah, 285 U.S. 105 (1932) (equal protection, due process and commerce clause challenges to statute forbidding advertising).

45. 316 U.S. 52 (1942).

profit. Chrestensen was told he might distribute handbills devoted to information or public protest,[46] and in response he distributed a second handbill with the advertisement on one side and a protest against the City Dock Department on the other. On certiorari, the Supreme Court characterized the handbill as a willful attempt to evade the ordinance, and held that the handbill was "purely commercial advertising"[47] and not the information and opinion which is entitled to first amendment protection.

The Court in a brief opinion cited no authority for its proposition, but indicated that commercial advertising was a part of the commercial activity of business and could be regulated by the legislature. The commercial speech doctrine began with this statement:

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.[48]

The test used in Chrestensen to determine whether or not the expression was purely commercial advertising focused on the intent,

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46. 316 U.S. at 53.

47. Id. at 54.

48. Id.

purpose, or motive of the advertiser. This test, subsequently labeled the primary purpose test,[49] considered all expression made for the primary purpose of commercial gain to be "commercial speech."

Chrestensen's intent and purpose for distributing his advertisement was financial gain in attracting crowds to his submarine, and to evade "the prohibition of the ordinance."[50] Thus, his advertisement was not entitled to first amendment protection.

The primary purpose test was again applied to determine whether or not speech was "commercial speech" in Breard v. Alexandria,[51] which upheld a municipal ordinance[52] forbidding

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49. Resnik, Freedom of Speech and Commercial Solicitation, 30 Cal. L. Rev. 655, 657 (1942).

50. 316 U.S. at 55.

51. 341 U.S. 622 (1951).

52. This type of ordinance was in wide use and known as a "Green River" ordinance, patterned upon a similar one in Green River, Wyoming, which was upheld in Town of Green River v. Fuller Brush Co., 65 F.2d 112 (10th Cir. 1933). For criticism of these ordinances, see Jensen, Burdening Interstate Direct Selling Under Claims of State Police Power, 12 Rocky Mt. L. Rev. 257, 269 (1940).

door-to-door commercial solicitation. A salesman for a large magazine subscription company was arrested for violating the ordinance. The Court conceded that the magazines being sold were reputable periodicals concerned with the exchange of ideas and entitled to first amendment protection, but stated that "selling, however, brings into the transaction a commercial feature."[53] The Court found that the privacy rights of the homeowners in prohibiting solicitors from entering their property without invitation outweighed the first amendment assertions of the magazine company, since the primary purpose of the solicitations was a commercial gain.[54]

Attempting to classify purely commercial speech by applying

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53. 341 U.S. at 642. The Court distinguished Martin v. City of Struthers, 319 U.S. 141 (1943), in which a similar prohibition was held invalid as applied to religious solicitors on the grounds that "no element of the commercial entered into this free solicitation." 341 U.S. at 643.

54. 341 U.S. at 641-45.

the primary purpose test proved to be difficult.[55] The primary purpose test looked to the motive behind the expression, and if the purpose of the advertiser was to make a profit, the

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55. Justice Douglas, who joined in the opinion of Chrestensen, criticized that opinion shortly after Breard was decided in a concurring opinion in Cammarano v. U.S., 358 U.S. 498, 513-15 (1959), noting that the ruling in Valentine v. Chrestensen "was casual, almost offhand. And it has not survived reflection." 358 U.S. at 514. And in Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 905 (1971), Douglas dissenting from denial of certiorari, commented that the holding in Valentine was "ill-conceived and has not weathered subsequent scrutiny." 404 U.S. at 905. See also Lehman v. Shaker Heights, 418 U.S. 298, 314-35, n. 6 (1974) (Brennan, J., with Stewart, Marshall & Powell, J.J., dissenting) (doubt about continuing validity of commercial speech distinction of Chrestensen); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 401 (1973) (Stewart, J., with Douglas, J., dissenting) (should limit Valentine to its facts).

speech was entitled to less protection.[56] This resulted in uneven application, since the primary purpose of authors, dramatists and others is often financial gain, yet their expression is clearly entitled to protection.[57] Newspapers are businesses whose primary purpose in publishing is financial gain, but this fact does not exclude them from the protection of the first amendment.[58]

The Court recognized this difficulty of application, and abandoned the primary purpose test in New York Times v. Sullivan,[59] looking instead to the content of the expression.

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56. Breard v. Alexandria, 341 U.S. 622, 642-44 (1951). Commentators have also been critical of the primary purpose test. See Note, Freedom of Speech in a Commercial Context, 78 Harv. L. Rev. 1191, 1203 (1965); Redish, The First Amendment in the Marketplace, 39 Geo. Wash. L. Rev. 429, 452 (1971); Developments in the Law -- Deceptive Advertising, 80 Harv. L. Rev. 1005, 1028 (1967).

57. See note 36 supra and accompanying text.

58. Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

59. 376 U.S. 254 (1964).

VI. It's the Content That Counts

A public official in Alabama sued the New York Times alleging that he had been libeled[60] by a political advertisement which the Times had been paid to publish. L. B. Sullivan, the public official, contended that "the constitutional guarantees of freedom of speech and of the press are inapplicable . . . because the allegedly libelous statements were published as part of a paid, 'commercial' advertisement."[61]

The Supreme Court stated that it was immaterial to first amendment issues that the Times had received payment for the ad;[62] the proper inquiry concerned the content of the ad to determine if it were "purely commercial advertising."[63] The

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60. The Times decision held that recovery for alleged libel of a public official requires that the statement be made with actual malice, which is knowledge that the statement is false or with reckless disregard of whether it is false or true. 376 U.S. 254, 282 (1964).

61. 376 U.S. at 265.

62. Id. at 266.

63. Id.

Court found that the advertisement in Times was distinguishable[64] from the purely commercial advertisement in Chrestensen on the basis that the ad in Times

> communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.[65]

The Court held that the ad was entitled to the same degree of constitutional protection as ordinary speech, even though it contained factually erroneous defamatory content.

The crucial question thus became whether the content of the advertisement dealt with expression of public interest and concern

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64. Under the primary purpose test, the advertisement in Times would be purely commercial speech and not subject to first amendment protection.

65. 376 U.S. at 266.

66. The Times opinion has been viewed as adopting Alexander Meiklejohn's view of the first amendment. See Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 S. Ct. Rev. 191, for an analysis of the Times decision and the first amendment. Meiklejohn views the central meaning of the first amendment as the right to self-

If the content of the expression was of public concern,[67] the expression was not purely commercial and hence became entitled

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government; thus the first amendment extends absolutely to all matters which might aid the citizen in political self-government. See Meiklejohn, The First Amendment Is An Absolute, 1961 S. Ct. Rev. 245, 254-57. For commentators discussing this aspect of Meiklejohn's theory, see Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 Geo. Wash. L. Rev. 429, 434-38 (1971); Comment, The First Amendment and Consumer Protection: Commercial Advertising as Protected Speech, 50 Ore. L. Rev. 177, 186 (1971); 48 Tul. L. Rev. 426, 430-31 (1974); Note, 63 Geo.L. J. 775, 800 (1975); Goss, The First Amendment's Weakest Link: Government Regulation of Controversial Advertising, 20 N.Y.L.J. 617, 624-25 (1975).

67. "Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged. . . ." Meiklejohn, The First Amendment As An Absolute, 1961 S. Ct. Rev. 245, 257.

to protection. The Court in Times adopted[68] the view that the public needs information of public concern since that speech aids in self-government, and thus is within the area of speech the first amendment was designed to protect.[69]

The content test[70] was again applied by the Supreme Court

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68. Mr. Justice Brennan, who wrote the Court's opinion in the Sullivan case, has acknowledged the influence of Meiklejohn views. See Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965).

69. Dr. Meiklejohn declared that the decision in Sullivan was "an occasion for dancing in the streets." Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 Geo. Wash. L. Rev. 429, 436 (1971).

70. The content method of classifying advertisements to determine which are unprotected as "purely commercial speech," is better than the primary purpose test, but still not without faults. See Note, Commercial Speech -- An End in Sight to Chrestensen?, 23 De Paul L. Rev. 1258, 1268 n. 56 (1974) ("content test is still objectionable since it does not directly allow consideration of the first amendment right of the public to information.").

in 1973,[71] in Pittsburgh Press Co. v. Pittsburgh Commission of Human Relations,[72] to determine if newspaper help-wanted advertisements were commercial speech and without first amendment protection. The Pittsburgh Press ran classified advertisements of jobs under sex-divided categories.[73] The Pittsburgh Human

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71. The Supreme Court had denied certiorari to several lower court decisions involving the commercial speech doctrine before granting certiorari in Pittsburgh Press. See, e.g., Banzhaf v. F.C.C., 405 F.2d 1082 (D.C. Cir. 1968), cert. denied sub nom., National Broadcasting Co. v. F.C.C., 396 U.S. 842 (1969); S.E.C. v. Wall Street Transcript Corp., 422 F.2d 1371 (2d Cir.), cert. denied, 398 U.S. 958 (1970).

72. 413 U.S. 376 (1973).

73. In an attempt to abide by the ordinance, the Pittsburgh Press arranged its classified employment advertisements according to the column headings, "Jobs -- Male Interest" and "Jobs -- Female Interest." The Press also printed a notice to job seekers that the job-listing arrangement was for the "convenience of our readers" because "most jobs generally appeal more to persons of one sex than the other." 413 U.S. 376, 394 (1973).

Relations Commission issued a cease and desist order,[74] claiming that the newspaper violated a city ordinance which forbade advertising that discriminated on the basis of sex. The United States Supreme Court affirmed the order, partly on the basis[75] that the advertisements in the paper were "classic examples of commercial speech"[76] since each was "no more than a proposal of possible employment,"[77] and also on the basis that the "commercial activity itself is illegal."[78]

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74. The order was modified and affirmed by the Commonwealth Court of Pennsylvania. 4 Pa. Commw. 448, 287 A.2d 161 (1972).

75. The Court considered several factors, including whether the order constituted prior restraint, whether the ordinance threatened the paper's financial viability or its ability to publish and distribute, whether the order abridged the paper's editorial judgment, and whether the ads were "legal" commercial activity. 413 U.S. 376.

76. 413 U.S. at 385.

77. Id.

78. Id. at 389.

The Pittsburgh Press permitted the advertiser to select the column in which to advertise,[79] and the paper argued that this constituted an exercise of its editorial judgment, and hence was protected.[80] But the Court found that the newspaper's editorial judgment was insufficient to separate it from the commercial character of the advertisement[81] and denied protection

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79. Id. at 386.

80. See Section III supra.

81. The Court stated:

> Under some circumstances, at least, a newspaper's editorial judgments in connection with an advertisement take on the character of the advertisement and, in those cases, the scope of the newspaper's First Amendment protection may be affected by the content of the advertisement. 413 U.S. at 386.

But four Justices dissented from the Court's holding. Burger, Ch. J., dissented on the grounds that the first amendment would not permit state regulation of the layout and organizational decisions of a newspaper. Stewart, J., joined by Douglas, J., dissented on the ground that no governmental agency can tell

to the expression. However, the Court reaffirmed protection for editorial judgments that are not integrated commercial statements:

> Nor, a fortiori, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial.[82]

The Court in Pittsburgh Press applied the Times content test and found that the advertisement did not express a "position,"

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a newspaper in advance what it can print, even on the advertising pages:

> So far as I know, this is the first case in this or any other American court that permits a government agency to enter a composing room of a newspaper and dictate to the publisher the layout and makeup of the newspaper's pages. This is the first such case, but I fear it may not be the last. The camel's nose is in the tent.
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> 413 U.S. at 402.

82. Id. at 391.

nor concern "social policy," nor did "any of them criticize the Ordinance or the Commission's enforcement practices."[83] As a result, the advertisement resembled the purely commercial speech of Chrestensen and not the protected expression of Times.[84]

There was an inference that if the content in the Pittsburgh Press advertisement had not concerned an illegal activity, then the proper approach would be a balancing of the governmental interest against "any First Amendment interest which might be served by advertising an ordinary commercial proposal. . . ."[85] However, the balancing[86] of interests was not applied in

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83. Id. at 385.

84. Id.

85. Id. at 389.

86. "The formula is that the court must, in each case, balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression." Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 912 (1963).

However, Mr. Justice Stewart, joined by Douglas, J., dissenting in Pittsburgh Press stated that "[s]o long as Members of this Court view the First Amendment as no more than

Pittsburgh Press, since the first amendment interest is "altogethe absent when the commercial activity itself is illegal. . . ."[87] But the inference -- that an advertisement has a first amendment interest to weigh against the governmental regulation -- was ripe for determination when Mr. Bigelow ran an abortion advertisement in his newspaper.

VII. Bigelow v. Virginia

In Bigelow v. Virginia,[88] the Supreme Court applied the Times content test to an abortion advertisement to determine

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a set of 'values' to be balanced against other 'values,' that Amendment will remain in grave jeopardy." Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 402 (1973) (Stewart, J., joined by Douglas, J., dissenting). See Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 Geo. Wash. L. Rev. 429, 447-48 (1971).

87. 413 U.S. at 389.

88. ___ U.S. ___, 43 U.S.L.W. 4735 (U.S. June 16, 1975).

that it "contained factual material of clear 'public interest.'"[89] The Court then balanced "the First Amendment interest against the governmental interest alleged,"[90] and held that the advertisement was entitled to first amendment protection. Since the advertisement "conveyed information of potential interest and value to a diverse audience"[91] concerning an activity pertaining to "constitutional interests,"[92] this outweighed any alleged state interest.

Bigelow, the editor of the Virginia Weekly newspaper, published an advertisement for a New York abortion referral service[93] and was convicted for violation of a Virginia statute

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89. Id. at 4738.

90. Id. at 4739.

91. Id. at 4738.

92. Id.

93. The advertisement had been placed by a New York City profit-making organization, Women's Pavilion, and offered assistance, "information and counseling," to women with unwanted pregnancies to obtain legal abortions in New York state. 43 U.S.L.W. 4735.

which made it a misdemeanor to encourage the procurement of an abortion. The Virginia Supreme Court upheld the conviction,[94] stating that the expression was a "commercial advertisement" which "may be constitutionally prohibited by the state."[95] The United States Supreme Court reversed,[96] holding that the statute as applied to Bigelow infringed constitutionally protected speech under the first amendment.

The Supreme Court noted that no contention had been made

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94. 213 Va. 191, 191 S.E.2d 173 (1972), vacated and remanded sub nom., Bigelow v. Virginia, 413 U.S. 909 (1973), aff'd per curiam on remand, 214 Va. 341, 200 S.E. 2d 680 (1973). The United States Supreme Court noted probable jurisdiction to review the first amendment issues. 418 U.S. 909 (1974). For criticism of Virginia Supreme Court's handling of the case, see Note, The First Amendment and Commercial Advertising: Bigelow v. Commonwealth, 60 Va. L. Rev. 154 (1974).

95. 213 Va. 191, 193-95, 191 S.E.2d 173, 174-76 (1972).

96. ___ U.S. ___, 43 U.S.L.W. 4735 (U.S. June 16, 1975).

that the content of the advertisement was within one of the categories[97] of speech that was unprotected,[98] and furthermore that the services advertised were "legally provided in New York at that time."[99] The Court then looked to the content of the advertisement to determine that it "did more than simply propose a commercial transaction,"[100] and therefore was not purely commercial and unprotected. Viewing the advertisement in its entirety, the Court found portions of the advertisement[101] communicated information and disseminated opinion, thus meeting the test enunciated in Times to receive first amendment protection.

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97. See notes 37-41, supra, and accompanying text.

98. ___ U.S. ___, ___, 43 U.S.L.W. 4735, 4737 (U.S. June 16, 1975).

99. Id. at 4738.

100. Id.

101. The advertisement is reproduced at 43 U.S.L.W. 4735. The advertisement pertained to abortion which the Court noted had "constitutional interests," and the portions communicating information were the lines, "Abortions are now legal in New York. There are no residency requirements." 43 U.S.L.W. at 4738.

After determining that the advertisement was not one of those "stripped of all First Amendment protection,"[102] the Court then undertook the "task of balancing"[103] the first amendment interest in freedom of speech and press against any public interest allegedly served by the state regulation.

The state contended that the statute forbidding any "publication, lecture, [or] advertisement" which encouraged the "procuring of abortion"[104] was within the legitimate state interest of maintaining the quality of medical care. The Court acknowledged that the state has a "legitimate interest in maintaining the quality of medical care within its borders,"[105] but noted that

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102. 43 U.S.L.W. at 4739.

103. "To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged." The Court goes on to assert that "a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." 43 U.S.L.W. at 4739.

104. 43 U.S.L.W. at 4735.

105. Id. at 4739.

the advertisement in no way affected the quality of medical services in Virginia. What the statute did was to regulate "what Virginians may hear or read"[106] about legal services offered in another state. The Court found this asserted interest "was entitled to little, if any, weight under the circumstances."[107] Thus, the balance tilted in favor of the first amendment "policy" of "dissemination of information and opinion."[108]

In Bigelow, as in Times, the crucial question concerns the nature of the content of the advertisement. Both advertisements concerned subjects of general public interest and concern. The Court in Bigelow noted that "the activity advertised [abortion] pertained to constitutional interests."[109] As the dissenting opinion notes, the Court is attempting to put this advertisement on a different footing from other commercial advertisements because it relates to abortion, which has been elevated to constitutional stature. The dissent views the ad as "predominatel

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106. Id. at 4740.

107. Id.

108. Id.

109. Id. at 4738.

commercial," with slight factual content or opinion, and would allow the statute to control the expression.[110] The majority of the Court viewed the content of the advertisement as concerning a subject of sufficient public interest to overcome the state regulation.

While the Court continued in Bigelow to decline the overruling of Chrestensen and the commercial speech doctrine, it has re-defined the limits of application.

VIII. Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.

The Court in Bigelow based its decision, in major, upon the fact that the subject matter of the advertisement related to an activity with which the state could not interfere. ("It contained factual material of clear public interest.") The Court was ducking the issue of whether purely commercial speech is entitled to first amendment protection. During the next term of court, the question was answered.

On May 24, 1976, the U.S. Supreme Court severely curtailed --

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110. Id. at 4740-42.

and to some commentators seemed to end -- the commercial speech doctrine.[111] Most newspaper advertising is now entitled to first amendment protection. In Virginia Board of Pharmacy v. Virginia Citizen Consumer Council, Inc.,[112] the Court struck down a Virginia statute forbidding the publication of an advertisement stating the price of prescription drugs. The Court held that the first amendment protected the purely commercial speech of "I will sell you the X prescription drug at the Y price."[113]

The Court acknowledged that even a purely commercial advertisement that does no more than propose a commercial transaction is not so removed from any exposition of ideas that it lacks all protection.[114]

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111. Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., ___ U.S. ___, 44 U.S.L.W. 4686 (U.S. May 24, 1976).

112. ___ U.S. ___, 44 U.S.L.W. 4686 (U.S. May 24, 1976).

113. Id. at 4689.

114. Id. at 4690.

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[115]

The Court thus acknowledges the importance of the information contained in advertisements, and concludes that even if the first amendment were primarily to enlighten public decisionmaking in a democracy, the Court "could not say that the free flow of information does not serve that goal."[116]

IX. Conclusion

Commercial speech, like other types of speech, is now protected by the first amendment. But that does not mean that all newspaper advertisements are protected by the first amendment.

The content of the advertisement must be examined to determine if it is denied protection of the first amendment for any of the following reasons:

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115. Id. at 4691

116. Id.

1. It falls within an inherently offensive category, or
2. it proposes an illegal activity (most such may be prohibited), or
3. it is fraudulent, or
4. it is untruthful speech.

The Court in Virginia State Board points out that the state can still restrict advertisements if it has a significant governmental interest and leaves open ample alternative channels for communication of the information. But, thankfully, newspaper advertisements can no longer be automatically excluded from first amendment protection by the incantation of "commercial speech."